SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SUIT NO:864/99

BETWEEN:

DAVID BICKFORD

Petitioner

VS

ST LUCIA ESTATES LIMITED

Respondent

Appearance

Mr. K. Monplaisir Q.C. with Mr. M. Maraj for Petitioner
Mr. D. Theodore for Respondent

2000: March 21st, 30th and 31st

September 19th

JUDGMENT

[1] **d'Auvergne J**,: On the 15th day of March 2000 the Respondent filed a Summons to strike out the Petition filed on the 16th day of November 1999 on the following grounds:

(1) That the Petitioner has no *locus standi* to institute these proceedings, being neither a creditor nor a registered shareholder of the Respondent's Company within the meaning of the Companies Act 1996.

(2) That the service of that petition was irregular and ineffectual in that service was made, not at the registered office of the Respondent, but at the Chambers of Theodore and Associates who were not authorised to accept such process.

[2] At that hearing Learned Counsel for the Respondent informed the Court that he intended to rely on the affidavit of Carroll Cavanagh filed on the 10th March 2000 and in particular paragraphs 2 – 6 which established the factual foundation for the application.

[3] Carroll Cavanagh deposed in the above noted paragraphs that the petition filed on the 16th November 1999 for the liquidation of the Respondent's Company ought to have been served upon the Respondent's Company itself, and not upon its solicitors, unless such solicitors were authorized by the Respondent's Board of Directors to accept service and that no such authorization was given to the Respondent's Solicitors and therefore any purported service of the winding up petition at the said firm was improper and should be set aside; that the Petitioner's claim to *locus standi* by virtue of being an alleged judgment creditor and contributory cannot stand since the default judgment in the Petitioner's favour in action No 693 of 1998 was set aside on the 10th day of December 1999, that this being so the Petitioner is not entitled to present the said petition as a judgment creditor.

[4] She further deposed that a perusal of a particular report and more specifically page 11, presented by the Petitioner at a meeting held on the 27th day of May 1997 the Petitioner noted the following:

"My time and expenses, as well as the outlays for the gift have been risk capital"; that as a prospective creditor in accordance with Section 379 (2) (b) of the Company's Act 1996 he should firstly give security for the Respondent's Company's Costs before the petition for winding up could be heard; that moreover he had not been a registered shareholder of the Respondent's Company for at least six months during the eighteen months preceding the filing of the petition.

[5] Learned Counsel re-iterated the above parts of Carroll Cavanagh's affidavit and argued that if the default judgment noted above did not exist therefore the Petitioner cannot be said to be a judgment creditor but rather a prospective creditor and therefore must seek leave of the Court before filing the petition.

[6] He said that under Section 379 of the Company's Act the responsibility is placed on the Petitioner to establish that he is either a Company or a contributory and that he had not done so.

[7] He vehemently argued and urged the Court to note that the petition for winding up being considered is not part of action 693/98 but a different case which was given a new number at the Registry of the Supreme Court.

[8] He quoted from a Canadian text book namely **Company Law of Canada by Fraser and Stuart 6th Edition Page 802** which states that a notice of a winding up petition must be served on the corporation. **(Re J F Cunningham and Son Ltd 1955 OWN at 670).**

[9] He argued that it was trite law that the petition must be served on the other side and this had not been done, that service of the Respondent's solicitor was improper service and therefore the petition should be struck out with Costs to the Respondents.

[10] Learned Senior Counsel for the Petitioner commenced his argument by informing the Court that the petition under review fell within the ambit of Section 379(1)(b) of the Company's Act 1996 which reads "a Creditor, including a contingent or prospective creditor of the Company." He said that when the petition for winding up was filed the Petitioner was a judgment creditor and that the fact that the order granting the Petitioner the status of judgment creditor was set aside does not deny him the status of a judgment creditor.

[11] He urged the Court to note **Section 379 (1)(b)** which states who and how a petition for winding up can be presented.
"a Creditor, including a Contingent or Prospective Creditor of the Company"

He said that the affidavit of Carroll Cavanagh in particular paragraph 19 clearly shows that there are issues to be solved and therefore the petitioner should be regarded as a prospective creditor.

[12] Paragraph 19 of Carroll Cavanagh's affidavit reads:

"The Petitioner has failed to provide a comprehensive account of his stewardship and the Respondent is unable to ascertain the veracity or otherwise of the allegations made in paragraph 15 of the said affidavit regarding the St. Lucia Bank Account. However, the Respondent continues to operate an American Bank Account."

[13] Learned Senior Counsel proceeded to make reference to the Petitioner's affidavit filed on the 17th day of March 2000. The gist of which is that, the Petitioner claims that he is a shareholder of the Respondent Company, the veracity of which could be confirmed from the records of the Company at the Registry; that he had filed exhibits showing Annual Returns of the Company to prove that he was indeed a shareholder and an affidavit of service which would indicate proper service on the company on the 25th February 2000.

[14] Learned Counsel in reply argued that the latest affidavit of the Petitioner actually confirmed the Respondent's argument that the petition should be struck out for he said the Petitioner had breached **Section 379(2)(A)** of the **Company's Act** and that the Petitioner could only file the petition for winding up after the 17th of

August 2000, (six months after the filing of the annual returns where he claims to be a registered shareholder.)

[15] He argued that the registered office of the Company is No. 7 Bourbon Street and that there has been no notice of change of that registered office. He said that the Petitioner could not unilaterally change the address of the said office without informing the other shareholders of the Company.

[16] **Conclusion**

In order to determine this summons I must first ascertain who can present a petition for winding-up.

Section 379 (1) states that application must be by petition and by

(a) the Company

(b) a Creditor, including a Contingent or Prospective Creditor, of the Company;

© a Contributory; or

(d) the trustee in bankruptcy to, or personal representative of, a Creditor or Contributory;

or any two or more of these parties.

[17] In my judgment the Petitioner should be considered a Prospective Creditor for in paragraph fifteen (15) of Carroll Cavanagh's affidavit mentioned in paragraph 19 she deposed that:

"The Respondent admits the fact of the civil action referred to in paragraph 11 of the said affidavit but denies that it is indebted to the Petitioner in the amount claimed."

[18] As I see it, the Petitioner has claimed a debt and one of the Directors of the Respondent's Company has deposed that she denies indebtedness in the amount claimed, Is it that she is admitting a debt of a smaller value? Whether or not this is the case, the fact that a claim has been filed, is in my judgment an indication that the Petitioner is afforded the opportunity of being successful and could become a Creditor, and should therefore be regarded as a Prospective Creditor.

[19] With regard to the improper service of the Petition, the affidavit of Arthur Isidore dated 25th February 2000 states that he served a copy of Notice of Hearing, Petition, Affidavit and List of Exhibits on the overseer Steven Lamontagne and this has not been contradicted.

[20] **Section 379 2 (b)** provides the followings:

"the Court shall not hear a winding-up petition presented by a Contingent or Prospective Creditor until such security for Costs has been given as the Court thinks reasonable and until a **prima facie** case for winding-up has been established to the satisfaction of the Court."

[21] In my judgment the words “shall not hear” are of paramount importance and the crux of the subsection. It is my view that there must be security for Costs before the hearing. The petition has been filed but has not been heard; the submission is therefore premature.

[22] In the premises my order is as follows:

That the summons to strike out the petition for winding up is hereby dismissed.

Costs will be Costs to the Petitioner in any event.

Suzie d’Auvergne
High Court Judge